Moon Trading Sdn Bhd v RHB Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-23–107 OF 2006
LAU BEE LAN J
20 FEBRUARY 2012

Tort — Defamation — Libel — Printing and publication of word 'counterfeit' on demand draft and email attachments — Whether words referred to plaintiff — Whether words complained of capable of bearing defamatory meaning — Whether plaintiff filed action against wrong party — Whether defendant liable for acts of its servant — Whether plaintiff had proved its case against defendant on balance of probabilities — Defences — Whether defendant could rely on defence of justification or qualified privilege — Damages — Whether plaintiff could claim for substantial damages

The plaintiff, a company in the business of trading and distribution of fumigation equipment and materials, was a customer of the defendant bank. On 21 July 2006, the plaintiff had purchased a demand draft made payable to Pest Fog Sales Corp ('Pest Fog'), a company situated in the USA. When Pest Fog presented the demand draft for payment, the demand draft was dishonoured by Citibank NA, the paying agent of the defendant in the USA, on the grounds that it was a counterfeit instrument. The plaintiff filed an action seeking damages for libel against the defendant. It was the plaintiff's case that the use, printing and publication of the word 'counterfeit' on the demand draft and the use of the word 'counterfeit' as well as the use of the phrase 'type of fraud' in several email attachments published constituted libel. By way of an application for further and better particulars the plaintiff discovered that the reason why the demand draft was classified as counterfeit was because of the use of a wrong branch code by the defendant bank that caused the demand draft not to be recognised by Citibank NA. In its defence the defendant bank submitted that the labeling of the counterfeit on the demand draft related to Citibank's internal security process and that the defendant had no control or authority over Citibank. As such, it was the defendant's contention that as the labeling of the word 'counterfeit' on the demand draft and the circulation of the email and attachments were done by Citibank NA, the plaintiff should have commenced the action against Citibank NA and not the defendant. The defendant also submitted that it had not been established that it had caused the internal branch code error. The defendant also relied on the defences of justification and qualified privilege.

Held, entering judgment in favour of the plaintiff for a refund and substantial damages with interest and costs of RM25,000:

(1) The evidence showed that the word 'counterfeit' was labeled on the demand draft which Pest Fog received directly from the plaintiff. The emails and their attachments also referred to the demand draft as 'counterfeit'. In the light of the evidence adduced, this court found that the use of the word 'counterfeit' by Citibank NA, as agent for the defendant, referred to the plaintiff (see paras 18–21).

(2) In construing whether the words complained of were capable of bearing a defamatory meaning, this court was of the view that there could be no doubt that the word 'counterfeit' was highly defamatory of the plaintiff and that a reasonable reader would have understood the defamatory imputation that was to be alluded to by the use, printing and publication of the word 'counterfeit' in the demand draft and the email attachments (see paras 25–26).

(3) Based on the principle of agency and the facts of the present case, the defendant was liable for the acts of its servant Citibank NA, which was done in the course of employment. Although the act of labeling the demand draft as 'counterfeit' may not be authorised, the defendant as master was liable for the act of its servant (see para 29).

(4) On the facts of the case, this court was satisfied that there was publication of the demand draft bearing the word 'counterfeit' to a third person (see para 30).

(5) In the light of the evidence it was proven on a balance of probabilities that it was the defendant who had committed a mistake when issuing the demand draft and that this mistake had caused the demand draft not to be recognised by Citigroup. In any event the defence of justification did not apply as the demand draft presented for payment was a valid one (see paras 38–39).

(6) The defendant's argument that the advice 'counterfeit' was published on an occasion of qualified privilege, namely based on its duty to communicate with customers and collecting banks as to the status of the demand draft and that the recipients of such advice had an interest in receiving such advice, could not stand. In the present case the defendant had committed a mistake when keying in the branch code number. As such, the defendant was not making a communication on a matter of common interest to it and to Citibank NA, because, except for the mistake, there was no matter of common interest that called for a communication (see para 41).

(7) In considering damages recoverable by the plaintiff, the court was of the view that the plaintiff was entitled to compensatory damages as well as

substantial damages. However, the quantum of the substantial damages had to be reasonable. Thus the court awarded the plaintiff a refund of the RM11,105.25, which was the sum payable on the demand draft, with interest and substantial damages to be assessed by the Deputy Registrar with interest (see paras 49–50 & 53).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat dalam perniagaan dagangan dan pengedaran peralatan dan bahan pengasapan, adalah pelanggan defendan bank. Pada 21 Julai 2006, plaintif telah membeli draf tuntutan yang perlu dibayar kepada Pest Fog Sales Corp ('Pest Fog'), sebuah syarikat yang terletak di Amerika Syarikat. Apabila Pest Fog mengemukakan draf tuntutan untuk bayaran itu, draf tuntutan itu tidak diterima oleh Citibank NA, ejen yang membayar kepada defendan di Amerika Syarikat, atas alasan bahawa ia merupakan alat palsu. Plaintif telah memfailkan tindakan memohon ganti rugi untuk libel terhadap defendan. Adalah kes plaintif bahawa penggunaan, percetakan dan penerbitan perkataan 'counterfeit' atas draf tuntutan dan penggunaan perkataan 'counterfeit' dan juga penggunaan ungkapan 'type of fraud' dalam beberapa lampiran emel yang diterbitkan membentuk libel. Melalui permohonan untuk butiran-butiran lanjut dan lain plaintif mendapati bahawa alasan kenapa draf tuntutan diklasifikasikan adalah kerana penggunaan kod cawangan salah oleh defendan bank yang menyebabkan draf tuntutan itu tidak dikenali oleh Citibank NA. Dalam pembelaannya defendan bank berhujah bahawa label palsu pada draf tuntutan berkait dengan proses dalaman Citibank dan bahawa defendan tiada kawalan atau kuasa ke atas Citibank. Oleh itu, adalah hujah defendan bahawa oleh sebab pelabelan perkataan 'counterfeit' pada draf tuntutan dan peredaran emel dan lampiran yang dibuat oleh Citibank NA, plaintif patut memulakan tindakan terhadap Citibank NA dan bukan defendan. Defendan juga berhujah bahawa tidak dibuktikan bahawa ia telah menyebabkan kesilapan kod cawangan dalaman. Defendan juga bergantung pada pembelaan-pembelaan justifikasi dan perlindungan bersyarat.

Diputuskan, memasukkan penghakiman menyebelahi plaintif untuk bayaran balik dan ganti rugi yang cukup banyak dengan faedah dan kos sejumlah RM25,000:

(1) Keterangan menunjukkan bahawa perkataan 'counterfeit' telah dilabelkan pada draf tuntutan yang mana Pest Fog telah menerima secara langsung daripada plaintif. emel-emel dan lampiran-lampiran mereka juga merujuk kepada draf tuntutan sebagai 'counterfeit'. Berdasarkan keterangan yang dikemukakan, mahkamah ini mendapati bahawa perkataan 'counterfeit' oleh Citibank NA, sebagai ejen bagi pihak defendan, merujuk kepada plaintif (lihat perenggan 18–21).

(2) Dalam mentafsir sama ada perkataan-perkataan yang diadu mampu membawa maksud berunsur fitnah, mahkamah ini berpendapat bahawa

tidak mungkin terdapat keraguan bahawa perkataan 'counterfeit' amat berunsur fitnah tentang plaintif dan bahawa pembaca yang munasabah akan memahami tohmahan berunsur fitnah yang disebabkan oleh penggunaan, percetakan dan penerbitan perkataan 'counterfeit' dalam draf tuntutan dan lampiran emel tersebut (lihat perenggan 25–26).

(3) Berdasarkan prinsip agensi dan fakta kes ini, defendan bertanggungjawab untuk perbuatan pekerja Citibank NA, yang telah dilakukan dalam waktu pekerjaan. Walaupun perbuatan pelabelan draf tuntutan sebagai 'counterfeit' mungkin tidak diberi kuasa, defendan sebagai majikan bertanggungjawab kerana perbuatan pekerjanya (lihat perenggan 29).

(4) Berdasarkan fakta kes, mahkamah ini berpuas hati bahawa terdapat penerbitan draf tuntutan yang mempunyai perkataan 'counterfeit' kepada pihak ketiga (lihat perenggan 30).

(5) Berdasarkan keterangan adalah dibuktikan atas imbangan kebarangkalian bahawa adalah defendan yang melakukan kesilapan apabila mengeluarkan draf tuntutan itu dan bahawa kesilapan ini telah menyebabkan draf tuntutan itu tidak dapat dikenali oleh Citigroup. Dalam apa keadaan pembelaan justifikasi tidak terpakai kerana draf tuntutan yang dikemukakan untuk bayaran adalah suatu yang sah (lihat perenggan 38–39).

(6) Hujah defendan bahawa nasihat 'counterfeit' telah diterbitkan atas dasar perlindungan bersyarat, terutamanya berdasarkan kewajipannya berkomunikasi dengan pelanggan dan bank kutipan berhubung statut draf tuntutan dan bahawa penerima-penerima nasihat sedemikian mempunyai kepentingan dalam menerima nasihat sedemikian, tidak boleh kekal. Dalam kes ini defendan telah melakukan kesilapan apabila memasukkan nombor kod cawangan. Oleh itu, defendan tidak membuat komunikasi berhubung perkara yang mempunyai kepentingan bersama kepadanya dan kepada Citibank NA, kerana, kecuali kesilapan itu, tiada perkara yang berkepentingan bersama yang memerlukan suatu komunikasi (lihat perenggan 41).

(7) Berdasarkan ganti rugi yang perlu dibayar balik kepada plaintif, mahkamah berpendapat bahawa plaintif berhak mendapat ganti rugi pampasan dan juga ganti rugi yang cukup banyak. Walau bagaimanapun, kuantum ganti rugi yang banyak itu hendaklah munasabah. Oleh itu mahkamah telah mengawardkan plaintif bayaran balik sejumlah RM11,105.25, yang merupakan bayaran yang perlu dibayar pada draf tuntutan itu, dengan faedah dan ganti rugi substansial yang perlu ditaksir oleh timbalan pendaftar dengan faedah (lihat perenggan 49–50 & 53).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Aktas v Westpac Banking Corp Ltd [2010] HCA 25, HC (folld)
Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)
Bumiputra-Commerce Bank Ltd v Top-A Plastic Sdn Bhd [2008] 5 MLJ 34, CA (refd)
Citizens' Life Assurance Co, Ltd v Brown [1904] AC 423, PC (refd)
Davidson v Barclays Bank Ltd [1940] 1 All ER 316, KBD (folld)
Great One Coconut Products Industries (M) Sdn Bhd v Malayan Banking Bhd [1985] 2 MLJ 469 (refd)
Jones v Skelton [1963] 1 WLR 1362, PC (refd)
Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283, HC (refd)
Praed v Graham (1889) 24 QBD 53 (refd)
Soh Chun Seng v CTOS-emr Sdn Bhd [2003] 4 MLJ 180, HC (refd)

Legislation referred to

Penal Code s 489A

CT Lee (Ros, Lee & Co) for the plaintiff.
Hoi Jack S'ng (Lee Hishammuddin Allen & Gledhill) for the defendant.

Lau Bee Lan J:

[1] In this action the plaintiff is seeking for damages for libel founded on a demand draft purchased from the defendant, a licensed banking institution, but which was later dishonoured by the defendant's agent on ground of 'counterfeit' including several email attachments which were purportedly circulated.

[2] In its defence, the defendant essentially contends the following:

> (c) The Defendant has no knowledge whether the Demand Draft was rightfully served for payment;
>
> (d) The Defendant has no knowledge whether an authentic Demand Draft was served for payment;
>
> (e) The Defendant has no control over Citibank in the process of settling payment and the labelling of the word 'counterfeit' on the Demand Draft and also the circulation of the purportedly defamatory email and attachment;
>
> (f) The labelling of the word 'counterfeit' on the Demand Draft and the circulation of the purportedly defamatory email and attachment can be justified;
>
> (g) The labelling of the word 'counterfeit' on the Demand Draft and the circulation of the purportedly defamatory email and attachment is

protected by qualified privilege as both the Defendant and Citibank have a common interest to ensure orderly payments are free from elements of cheating.

[3] The facts of the case are these. The plaintiff is a customer of the defendant. On 21 July 2006, the plaintiff purchased a demand draft from the defendant bearing No 292699585 for the sum of USD$2,985 (equivalent to RM11,105.25) ('the demand draft') made payable to Pest Fog Sales Corporation, 1424, Bonita Corpus Christi, Texan, 78404 USA ('Pest Fog').

[4] The payment and/or clearance of the demand draft is to be made through Citibank (New York State) for Citibank NA ('Citibank NA'), the official representative of the defendant and/or paying agent of the defendant in USA.

[5] On 26 July 2006, Pest Fog presented the demand draft for payment through American Bank ('the collecting bank'), however on 27 July 2006, the demand draft was dishonoured by Citibank NA on the ground that it was a counterfeit instrument.

[6] On 31 July 2006, one Miss Farith Conguta, an investigator with Citigroup Investigative Services sent out an email to Miss Kelly of American Bank informing her that the demand draft was a counterfeit and enclosing a capture of the demand draft labelled 'COUNTERFEIT' by Citibank NA. For purposes of clarity, the contents of the said email reads:

Ms Kelly,

As per our telephone conversation, I am an investigator for Citigroup Investigative Services located at our Citigroup offices in Tampa, Florida.

I handle a range of matters for Citigroup including investigation on stolen or counterfeit Worldlink checks.

I am writing to advise you of a counterfeit Citibank Worldlink number 292699585 in the amount of $2,985.00 payable to Pest Fog Sales Corp. deposited on 7/26/2006 at one of your branches. The check is be returned through regular banking channels and no goods or cash should be released against it.

Below you will find details and an attachment of the back of the item. Please feel free to contact our office if further information is needed.

Thanking you in advance.

Farith Conguta

Investigator,

Citigroup Investigative Services.

3800 Citibank Center B1-18,

A Tampa, Florida 33610

(813) 604-6811 Fax 604-6815

[7] The said email contained an attachment bearing amongst others, the B following particulars:

Subject: US Currency Counterfeit Return Item — IRD

292699585

C Serial Number: 292699585

Client Number: 52012

Issue Amount:

Counterfeit Amount: 2,985.00

D Currency Number: 02000

Date of Fraud: 7/28/2006

Type of Fraud: Counterfeit

E First Cashing Bank: American Bank.

[8] The plaintiff avers in the use, printing and the publication of the following words:

F (a) perkataan 'Counterfeit' ke atas Demand Draft tersebut; dan/atau

(b) perkataan 'Counterfeit' dalam email tersebut; dan/atau

(c) ayat 'no goods or cash should be released against it' dalam email tersebut; dan/atau

G (d) ayat 'Type of Fraud' dalam 'attachment' email tersebut.

the defendant or Citibank NA mean and is understood to mean that the plaintiff, a trading company which:

H (a) telah melakukan tindakan penipuan dengan memalsukan atau menirukan Demand Draft tersebut;

(b) sanggup dan sedia untuk melakukan aktiviti-aktiviti penipuan yang bersifat jenayah untuk keuntungan;

(c) tidak boleh dipercayai;

I (d) dengan siapa tidak sepatutnya diadakan urusniaga.

[9] Upon being informed by Pest Fog that the demand draft was dishonoured on ground of it being a counterfeit, the plaintiff instructed his

solicitors to write to the defendant for clarification and a public apology from the defendant (bundle B p 9). Apart from telling the plaintiff they would investigate the matter vide the defendant's letter of reply dated 22 September 2006 (bundle B p 9), there was no response given to the plaintiff within a reasonable time.

[10] On 19 October 2006 the plaintiff filed this suit against the defendant.

[11] Vide an order of the court dated 27 April 2009 the defendant was ordered to serve further and better particulars on para 13 of the statement of defence ie the result of the investigation as to why the demand draft was dishonoured. On 11 May 2009 the defendant served on the plaintiff the further and better particulars:

(1) Hasil siasatan yang disebut melalui surat Defendan bertarikh 22hb September 2006 yang dirujukkan dalam perenggan 13 Pernyataan Pembelaan bertarikh 19hb Disember 2006.

Butir-butir:

Report given by Worldlink Payment Service, Citigroup Corporate and Investment Banking, Citigroup Europe plc:

(i) 21.07.2006: Cheque issuance was received from RHB. The cheque issuance for 292699585 posted with an incorrect branch number during update. On RHB's file, branch 0084 was listed, however this serial number was acknowledged to branch 3017. Due to this error, the issuance could not be automatically posted.

(ii) 24.07.2006: (note 22-23.07.2006 are non-business days). The issue posting exception investigator noted the incorrect branch number and repaired it, however the repair was not correctly entered into the WorldLink system.

(iii) 27.07.2006 The item was presented for clearing through Fed. The item was presented as an IRD (image replacement document).

(iv) 28.07.2006 The investigator reviewed the item and was unable to validate any security features, due to the cheque being presented as an IRD. She also noted that the client (RHB) number has had 11 other counterfeit items presented against their account in year (since 01.01.2006). In addition, the amount in question was a common fraudulent amount (26 of the 193 fraud attempts in the year have been for the same dollar amount). Based on that, the investigator returned the item.

RHB's response to seek clarification:

(i) RHB did not know why there was a branch code problem with it comes to draft no 292699585 when there has been no similar problem in respect of WorldLink CRS draft issued by RHB Jalan Bukit Bintang branch in the past. In this respect, RHB enquired as to how did Citibank/WorldLink obtain the branch code.

A

(ii) There was no confirmation obtained from RHB before and during attempt to repair the branch code was done. RHB sought for clarification if WorldLink have the authority to repair the branch code and also enquired in respect of repair which was not correctly entered in the WorldLink system.

B

(iii) There was no effort made to confirm with RHB on the presentation of draft no.292699585 before returning it as 'counterfeit'.

[12] As contained in the statement of agreed issues to be tried ('D') the issues C to be tried are:

(1) Samada perkataan 'Counterfeit' yang diindorskan ke dalam Bank Draft tersebut bersifat fitnah? ('1st issue')

(2) Samada perkataan 'Counterfeit' tersebut merujuk kepada Plaintif? ('2nd issue') D

(3) Samada kandungan email bertarikh 31.07.2006 yang ditulis oleh wakil Defendan bersifat fitnah? ('3rd issue')

(4) Samada kandungan email bertarikh 31.07.2006 tersebut merujuk kepada Plaintif? ('4th issue') E

(5) Samada Defendan dapat mendirikan 'justifikasi' sebagai pembelaannya dalam kes ini? ('5th issue')

(6) Samada Defendan dapat mendirikan 'perlindungan bersyarat' sebagai pembelaannya dalam kes ini? ('6th issue').

F

[13] The court has considered the defendant's written submission dated 9 January 2012, the plaintiff's written submission dated 13 January 2012, the defendant's reply submission dated 20 January 2012. The court's findings are G the following.

THE LAW

[14] It suffices for me to state that the law is trite in that in an action for libel, H the burden of proof lies on the plaintiff to prove:

(a) the words are defamatory;

(b) the words refer to the plaintiff; and

I (c) the words were published.

Support for this proposition is the case *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 (HC) at p 316 cited by both parties and the case of *Soh Chun Seng v CTOS-emr Sdn Bhd* [2003] 4 MLJ 180 at p 188 G–H to p 189 A–B which followed *Ayob bin Saud*'s case.

SECOND AND FOURTH ISSUES — WHETHER THE WORDS REFER TO THE PLAINTIFF

[15] Firstly, I shall deal with the second and fourth issues together as they are interwined.

[16] As was correctly submitted by the plaintiff, whether or not the words could have been understood as referring to the plaintiff is a matter of facts to be gathered from the surrounding circumstances of the case. The evidence showed the plaintiff is in the business of trading and distribution of fumigation equipment, materials, substances, insecticides and fumigants to government agencies, pest controllers certified fumigation companies and international manufacturers in Malaysia. The plaintiff purchased the demand draft from the defendant and later sent the original copy to his supplier, Pest Fog. This is supported by the testimony of DW1, Miss Kavitha a/p Vadiveloo who in examination-in-chief testified that two copies of the demand draft will be given to a customer, namely the original copy which will be given by the customer to the beneficiary and one other copy; and two other copies will be kept by the defendant. Further, in cross-examination DW1 confirmed that the defendant would not deliver the demand draft to the payee.

[17] In addition, the defendant itself vide its letter dated 22 September 2006 (bundle B p 9) in response to the plaintiff's solicitor's letter dated 1 September 2009 which alleged that the demand draft was a counterfeit had categorically stated 'On our end, we assure you that RHB Bank never issued any counterfeit demand draft'.

[18] I agreed with the submission of the plaintiff that if the demand draft was dishonoured on account of 'refer to drawer', 'not sufficient', 'account closed' or 'account frozen', it would be difficult to ascertain whether such words could have been reasonably understood as referring to the plaintiff. However, here the evidence showed that that the word 'counterfeit' was labelled on the demand draft which Pest Fog received directly from the plaintiff.

[19] With respect to the email dated 31 July 2006 (bundle B pp 4–5), one Farith Conguta had advised Miss Kelly from American Bank that the said demand draft was a counterfeit and 'is to be returned through regular banking channels and no goods or cash should be released against it'.

[20] Vide the same email, Farith Conguta forwarded another email dated 28 July 2006 bearing the particulars of the demand draft, namely, the serial

number, the counterfeit amount, the cashing bank to be the American Bank and a copy of the demand draft in jpeg file format labelled 'counterfeit' was attached.

[21] In the light of what I have discussed above, I find that the word 'counterfeit' used by Citibank NA as agent for the defendant refers to the plaintiff. Therefore, in this regard, I find the submission of the defendant (i) that the words do not refer to the plaintiff; and (ii) there is no reference to the plaintiff in the demand draft and the email and attachment but rather the words on the demand draft refer to the defendant is untenable.

FIRST AND THIRD ISSUES — WHETHER THE WORDS ARE DEFAMATORY

[22] The defendant submits that the words complained of, in their natural and ordinary meaning does not have the meaning ascribed to them by the plaintiff either in the pleading or its evidence. With regret I cannot accept the defendant's contention.

[23] Firstly, in construing whether the words complained of are capable of bearing defamatory meaning, is suffice for me to quote a passage from the Privy Council case of *Jones v Skelton* [1963] 1 WLR 1362 cited by the learned judge at p 325 of the case of *Ayob bin Saud*:

> The test, according to the authorities is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libellous sense.
>
> The ordinary and natural meaning of it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words. See *Lewis v Daily Telegraph Ltd*. The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

[24] Even words like 'refer to drawer', 'not sufficient', 'accounts closed' or 'frozen account' and the like have been determined to be defamatory (see *Bumiputra-Commerce Bank Ltd v Top-A Plastic Sdn Bhd* [2008] 5 MLJ 34 (CA) at p 45 para 19). What more for the word 'counterfeit' which according to 'The

Penguin English Dictionary' means 'adj made in imitation with intent to deceive; forged; spurious; n skilful and dishonest imitation; forgery; impostor, cheat'.

[25] Further, the gravity of the word 'counterfeit' is driven home when the act of counterfeiting bank notes is an offence which is punishable with a mandatory jail sentence for a term of 20 years under s 489A of the Penal Code. As such I agree with the plaintiff there can be no doubt that the word 'counterfeit' is highly defamatory of the plaintiff and a reasonable reader would understand the defamatory imputation alluded to in para 3.85 above.

WRONG PARTY SUED

[26] The defendant contends — (i) the labelling of the word 'counterfeit' on the demand draft and the circulation of the email and attachment were done by Citibank NA; (ii) the defendant has no control over Citibank NA in the process of settling payment and the labelling of the word 'counterfeit' on the demand draft and the circulation of the email and attachment; and (iii) the plaintiff should have commenced this action against Citibank NA and not the defendant.

[27] In my judgment, the defendant's contention cannot be sustained. In *Citizens' Life Assurance Co, Ltd v Brown* [1904] AC 423 (cited by the plaintiff), the appellants are an assurance company carrying on business in New South Wales. The respondent-plaintiff, Brown, was in the service of the company as an insurance agent, from January–June 1900. Brown was introduced to the company by Fitzpatrick, who was employed by the company as a superintendent of agencies under the terms of an agreement. Shortly after leaving the company, Brown entered the service of a rival company, Standard Life Association, and while in the service of such company Brown visited divers of the policy-holders in the appellant company, and endeavoured to induce such policy-holders to leave the appellant company and to insure in the Standard Life Association by making statements derogatory to the former. Fitzpatrick, published such statements which were defamatory in a circular letter sent to several persons insured in the appellant company in answer to inquiries made by them. The jury found for the plaintiff who obtained damages and found that 'Fitzpatrick was acting in publishing the libel within the scope of his employment and in the course of his employment'. The plaintiff obtained judgment and the Supreme Court refused to set aside the verdict and judgment entered for the defendants, hence the appeal.

[28] Counsel for the appellant had two contentions, (i) that the verdict was wrong in finding that Fitzpatrick acted in publishing the libel within the scope and in the course of his employment; and (ii) even if he did, yet the malice with

which he wrote it cannot be imputed to the company. In disposing the second question, the court found that the scope of Fitzpatrick's authority and employment was wide and by no means clearly defined. At p 428 the Privy Council opined:

> He said: 'although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this board (in *Mackay v Commercial Bank of New Brunswick* (1); *Swire v Francis* (2)), and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v English Joint Stock Bank* (3), which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v City of Glasgow Bank* (4), and has been followed in numerous other cases.

[29] Applying the aforesaid principle of agency to the factual matrix of this present case, Citibank NA being an agent of the plaintiff cannot now say it is not liable as the defendant as a master is liable for the act of his servant, Citibank NA which it is done in the course of employment, although the particular act of labelling 'counterfeit' which gives rise to the defamation suit may not be so authorised in the sense contended by the plaintiff as alluded to in para 10(i)–(ii) above.

WHETHER THE WORDS WERE PUBLISHED

[30] To establish the ingredient of whether there is publication of the libel, the defamatory matter must be published to a third person other than the plaintiff ie it is making known of the defamatory matter, after it has been written, to some person other than the person to whom it is written. In this instant case it is crystal clear that the evidence revealed the original copy of the demand draft was sent by the plaintiff to Pest Fog who on 31 July 2006 informed PW1 the demand draft was dishonoured because it was a counterfeit. Further, Farith Conguta, the investigator from Citibank had emailed to Miss Kelly of American Bank, the first cashing bank informing her the demand draft was 'counterfeit' and 'no goods or cash should released against it'. Hence I am satisfied there is publication of the demand draft bearing the word 'counterfeit' to a third person.

FIFTH ISSUE — WHETHER THE DEFENDANT CAN SET UP THE DEFENCE OF JUSTIFICATION?

[31] Having found that the plaintiff has established on a balance of probabilities the three elements necessary to make out a libel case against the defendant, I shall now examine the defence raised by the defendant.

[32] With respect to the process adopted by the defendant in the issuance of a demand draft, in examination-in-chief (Q & A5), the DW1 testified:

> At the branch level, a customer will fill up a remittance application form. The Defendant's teller will then key in the necessary details into the system such as applicant name, demand draft number, beneficiary's name, amount, currency rate etc. 4 copies of the demand draft will be printed and then signed — the original copy and one copy will be given to the customer (with the original copy to be given by the customer to the beneficiary) and two copies will be kept by the Defendant.
>
> At the Head Office Remittance level, the system will also at the same time capture the demand draft issued by the Branch. The *Defendant's IT department will compile the data at night and the same will be forwarded to Citigroup the next day.* (Emphasis added.)

[33] Vide the investigation report dated 22 September 2006 (bundle B p 10) Citigroup informed the defendant the reason why the demand draft was dishonoured and labelled 'counterfeit' is reflected in the first para:

> Dear Ms Kwa,
>
> With the assistance of Citigroup Security & Investigative Services ('CSIS'), we have investigated the facts surrounding the Counterfeit Draft and have determined that *an initial error was made by RHB Bank that caused the item to be flagged as counterfeit and to be returned. The error was due to RHB Bank issuing the original draft under a branch number that was different from the one assigned by Citibank to the WorldLink check stock.*
>
> The timeline of events leading to this event and details of prior counterfeit cases are outlined below:
>
> 7/21/06 — Cheque issuance was received from RHB. *The cheque issuance for 292699585 posted with an incorrect branch number during update. On RHB's file, branch 0084 was listed, however this serial number was acknowledged to branch 3017. Due to this error, the issuance could not be automatically posted.*
>
> … (Emphasis added.)

[34] With respect to the branch code error of 3017 and 0084, DW1 explained:

> The branch code of '3017' and '0084' both belong to the Defendant. However, both the branch codes serve different function — '3017' is client number assigned by Citigroup for the different branches in their system for their own reference. The Branch will use this number when placing orders for demand drafts with Citigroup while '0084' is the Defendant's internal branch code and for the Defendant's own purpose only.

[35] In *cross-examination* regarding the branch code 0084, DW1 said:

(a) '[Citigroup] do not have 0084 in their records';

A (b) 'When the demand draft is paid, the Citigroup will update with 3017 only. They won't update with 0084. That 0084 belong to individual branch only';

(c) 'Once we issue demand draft, it is actually auto update … [that] one I'm not sure';

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(d) disagreed when it was put to her that the defendant had accidently or mistakenly posted 0084 as a branch code instead of 3017 as a code assigned by Citibank;

C (e) when questioned if she disagreed, how come Citibank knew about this 0084 since it is the defendant's internal branch code, DW1 assumed that Citigroup has called Bukit Bintang branch and 'maybe they will like to know or confirm the branch code';

(f) the defendant received the letter of demand from the plaintiff's solicitors
D on 1 September 2006 (bundle B pp 12–14); and the defendant responded on 22 September 2206 (bundle B p 9 that 'CitiService is the counterpart checking on all the documents and matters at the receipient's end and they will be forwarding us an explanation letter soon. We shall transmit the same letter to you upon our receipt of the same'. Yet the
E Defendant did not proffer an explanation from Citibank to the plaintiff;

(g) the defendant knew as early as 22 September 2006 (bundle B p 10), the same date as the plaintiff's solicitor's letter that the reason why the demand draft was classified as counterfeit was because of a wrong branch code was posted;

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(h) that there was an application by the plaintiff in 2008 for further and better particulars and the first paragraph of Citigroup's investigative report (bundle B p 10) was not mentioned in the further and better particulars supplied by the plaintiff;

G

(i) although DW1 disagreed when it was put to her that the reason why the first paragraph was omitted was because it points to the fault of RHB, but she agreed that the defendant only replied to Citigroup's investigative report about nine months later (period from 22 September 2006–1 June 2007);

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(j) DW1 confirmed there was no further reply from Citibank to the defendant's letter dated 1 June 2007;

(k) that Citigroup has authority from the defendant to dishonor the demand draft if it is a real counterfeit; and

I

(l) when asked as to why if she did not admit that it was the defendant's fault, yet the defendant did not pursue with Citibank further, DW1 replied that it was because the defendant received the plaintiff's solicitor's letter (dated 1 September 2006).

[36] In *re-examination* DW1 merely confirmed that the process of settling payment and the labelling of the word 'counterfeit' on the demand draft were matters which relate to Citibank's internal security process and the defendant has no control or authority over Citibank.

[37] The defendant submits it has not been established on a balance of probabilities that it was the defendant who had caused the internal branch code error:

(a) There were no similar problems in the past;

(b) DW1 confirmed that demand drafts from the same set were not marked 'counterfeit' and were paid out;

(c) Citibank never responded to the Defendant's queries in its letter of 1.6.2007;

(d) Citibank's investigator had relied on 2 other factors in making her decision to label the Demand Draft a 'counterfeit' — other counterfeit items presented and the sum being a common fraudulent amount.

[38] With respect I cannot accept the defendant's contention. In the light of the evidence alluded to above, despite all the denials by DW1, I am persuaded by the plaintiff's argument that on a balance of probabilities that it was the defendant who has committed a mistake when issuing the demand draft at the branch level or when compiling the data at the head office remittance level in that instead of keying into the system '3017', the defendant's internal branch code 0084 was mistakenly entered into the system and which caused the demand draft not to be recognised by Citigroup.

[39] In any event the defence of justification does not bite as the DW1 stated that the demand draft presented for payment was a valid demand draft.

SIXTH ISSUE — WHETHER THE DEFENDANT IS ENTITLED TO THE DEFENCE OF QUALIFIED PRIVILEGE

[40] The defendant submits that the labelling of the word 'counterfeit' on the demand draft and the circulation of the email and attachment is protected by qualified privilege as:

(a) both the defendant and Citibank have a common interest to ensure orderly payments are free from elements of cheating; and

(b) banking processes are put in place and adopted by the defendant and Citibank pursuant to their legal and moral duty to ensure there are no fraudulent transactions citing *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283.

[41] I find the defendant's contention cannot be sustained as it is the finding of this court that the defendant has committed a mistake when keying in the branch code number 0084 instead of 3017. In my judgment the defendant could not rely on the defence of qualified privilege as the defendant could not by making a mistake and thereby labelling the word 'counterfeit' on the demand draft create on their part a duty to make communication a necessity for which had never arisen. Similarly, they were not making a communication on a matter of common interest to them and to Citibank NA, because, except for their mistake, there was no matter of common interest connected with the demand draft which called for a communication. I rely on the case of *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316.

[42] In the case of *Davidson* the bank had dishonoured a cheque drawn by the plaintiff, a credit bookmaker, after the bank had failed to comply with a stop order placed by the plaintiff on an earlier cheque. If the bank had implemented the stop order, there would have been funds available in the account to meet the cheque in question. The plaintiff alleged that the words 'not sufficient' marked on the dishonoured cheque were a libel upon him in his way of business to which the bank contended were written was one of qualified privilege.

[43] It is noteworthy that the decision in case of *Davidson* was upheld by the High Court of Australia by a majority decision in *Aktas v Westpac Banking Corp Ltd* [2010] HCA 25. The brief facts of the case are: One of the accounts which the second respondent ('Homewise') operated with the first respondent ('Westpac') was the homewise rent trust account. Mr Aktas was a director, sole shareholder and chief executive of Homewise. He was the counter-signatory to 30 cheques which were drawn on that account on 1 December 1997. The cheques were returned that day by Westpac stamped 'refer to drawer'. Where a cheque had been presented for payment by a customer of Westpac a letter was also sent containing the same advice. The cheques came to be stamped with the advice as a result of an error on the part of an employee of Westpac. That person had not realised that a garnishee order made by a local court, naming homewise as the judgment debtor, could not be applied to the trust account. As a result of that mistake the status of the account was designated 'PCO' ('post credits only'), which effectively prevented any cheques being paid from the account. The error was corrected the following day. Westpac pleaded that the advice 'refer to drawer' was published on an occasion of qualified privilege and gave as particulars that it had a duty to communicate with its customers and collecting banks as to the status of the cheques and that the recipients of the advices had an interest in receiving such advice (as summarised by Kiefel J at p 29 and p 30 of his dissenting judgment). The primary judge upheld the defence and the Court of Appeal upheld that decision. However on appeal by Mr Aktas, the

High Court of Australia allowed the appeal and held that the defence of qualified privilege was not made out by Westpac. A

[44] In the case of *Aktas*, the issue was communication of dishonour of the cheques made on an occasion of qualified privilege and was there an occasion where there was a duty of an interest in making and receiving the defamatory communication? In the course of judgment, Their Lordships, French CJ, Gummow and Hayne JJ, alluded to the case of *Davidson* and at p 12 of the report, stated the reasoning of Hilbery J in *Davidson* at pp 322–323: B

> [T]hat there was no matter of common interest between the bank and the payee which called for a communication; there would have been such a matter of common interest only if the occasion had called for the rejection of the cheque. Where there were (or, here, should have been but for the error by the bank) sufficient funds to meet the cheque, the only matter of common interest had been in the bank paying the cheque. C D
>
> Particular attention was focused in argument in this court upon the proposition stated in Davidson that:
>
> > you cannot, by making a mistake, create the occasion for making the communication, and what the bank seek[s] to do here is to create an occasion of qualified privilege by making a mistake which called for a communication on their part. E

[45] At p 13 Their Lordships, French CJ, Gummow and Hayne JJ further said: F

> The absence of such a public interest in *Davidson*, and in this case, can be demonstrated by the absence of any reciprocity of interests between bank and payee. The bank has an interest in communicating because it refuses to pay. But the payee has no interest in receiving a communication of refusal to pay a cheque which is regular on its face in a case where the drawer of the cheque has funds sufficient to meet its payment … That being so, it is wrong to identify some community of interest in the communication actually made as arising out of a need or desire on the part of the bank to say that payment is refused or as founded in some more general notion of the payee needing or wanting to know 'the fate' of the cheque. As explained earlier, the bank acts as it does in what it perceives to be its interests. And for the payee of the cheque, there will be no need for any communication from the bank about the fate of the cheque, if it is met on presentation … To hold that giving notice of dishonour of a cheque is an occasion of qualified privilege is not conducive to accuracy on the part of banks faced with the decision to pay or dishonour a cheque as soon as reasonably practicable. To hold banks responsible to their customers not only in contract, but also for damage to reputation, is conducive to maintaining a high degree of accuracy in the decisions that banks must make about paying cheques. G H I

[46] I am of the view that the proposition in the case of *Davidson* and upheld in the case of *Aktas* is equally applicable to the circumstances of the present case. In the former case, the dishonor of the cheque was occasioned by the mistake of a bank in keeping a customer's account whilst in the latter case, the mistake of the bank was said to be an error in failing to appreciate the interpretation of the garnishee order. In the instant case to reiterate, the mistake was when the defendant keyed in the branch code number 0084 instead of 3017.

[47] Re the case of *Davidson v Barclays Bank Ltd* the defendant submits can be distinguished as follows:

(a) The labelling of the word 'counterfeit' on the Demand Draft and the circulation of the email and attachment were done by Citibank;

(b) The Defendant had no control or authority over Citibank in its process of settling payment and its exercise of discretion in doing so;

(c) Citibank having found that the Demand Draft was a 'counterfeit', based on several factors, was under a legal duty to act as it did.

[48] I find the grounds referred to in para 16(a) and (b) above are untenable on the principle of agency alluded to in *Citizens' Life Assurance Co, Ltd*. The same goes for the ground in para 16(c) as this argument cannot stand in the face of the court's finding that the defendant has committed a mistake.

DAMAGES RECOVERABLE

[49] It was agreed by the parties at the outset that damages will be assessed by the deputy registrar upon the liability of the defendant being established.

[50] Basically the defendant submits the plaintiff is only entitled to compensatory damages which is fair and reasonable but not to aggravated damages by now seeking to show 'bad conduct' of the defendant as the plaintiff's claim is only for general damages for the libel.

[51] It is without a doubt that the plaintiff did not claim for aggravated damages. In *Great One Coconut Products Industries (M) Sdn Bhd v Malayan Banking Bhd* [1985] 2 MLJ 469 the learned judge held that where the plaintiff is a trader he is entitled to recover substantial but reasonable damages for the wrongful dishonor of his bank draft. He need not even plead or prove actual damage.

[52] Further, the court is entitled to look at the whole conduct of the defendant from the time the libel was published to the time the court gives the

verdict ie what the defendant's conduct has been before action, after the action and in court during the trial (per Lord Esher MR in *Praed v Graham* (1889) 24 QBD 53 cited in *Top-A Plastic Sdn Bhd*.

[53] Following the principles alluded to and having regard to the evidence referred to in paras 13.1–13.5 above, the court is of the view that the submission of the plaintiff on the factors to be considered in awarding substantial damages to the plaintiff should be given due weight:

(a) Citigroup had on 22 September 2006 notified the defendant the reason why the bank draft was dishonoured (see p 10 bundle B), however, in their letter dated 22 September 2006 to the plaintiff (see p 9 bundle B), the defendant still covered up the actual reason intentionally and asked the plaintiff to wait patiently for their investigation, a process which according to them, 'delay is inevitable given the multiple jurisdictional nature of the transaction';

(b) although the defendant had, vide its letter dated 22 September 2006, confirmed to the plaintiff that they were 'in the process of conducting comprehensive investigations to unearth what actually happened', however, the first letter they wrote to Citibank was about nine months later, ie on 1 June 2007 (see p 11 bundle B). This shows that the defendant was not keen at all to investigate the matter and this is probably so because they already knew it was their mistake;

(c) apart from telling the plaintiff, vide its letter 22 September 2006, that they would investigate and furnish the result to the plaintiff, the defendant just did not bother to keep the plaintiff informed about the progress of investigation;

(d) with full knowledge (as early as on 22 September 2006) that the bank draft was dishonoured due to their own mistake in entering the branch code, the defendant, on 19 December 2006, still pleaded 'justification' as their defence and claimed that it could be a case where a fake draft was presented for payment;

(e) when asked to reveal the result of the investigation, the defendant not only refused to honour its earlier promise as per its letter dated 22 September 2006, they actually went to the extent to challenge the application by the plaintiff for further and better particulars;

(f) even with an order of court to serve further and better particulars, the defendant still highhandedly tailored the particulars by leaving out from their statement the date of the investigation report from Citigroup which is 22 September 2006.

A However the quantum of the substantial damages have to be reasonable.

CONCLUSION

B **[54]** Based on a balance of probabilities I find the defendant is liable for the libel and I hereby make the following order:

(a) judgment is to be entered in favour of the plaintiff in terms of prayer 18(a) ie a refund of RM11,105.25;

C (b) interest at the rate of 4% to be calculated on a daily basis on RM11,105.25 till the date of full realisation;

(c) further, that the defendant is liable to pay the plaintiff substantial damages which are reasonable which is to be assessed by the deputy registrar as agreed by the parties;

D (d) interest at the rate of 4% from the date of 28 July 2006 till the date of full realisation; and

(e) costs of the action to the plaintiff fixed at RM25,000.

E *Judgment entered in favour of plaintiff for a refund and substantial damages with interest and costs of RM25,000.*

Reported by Kohila Nesan

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